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FILED
JAN 28 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 523

AB ELECTROLUX,

Petitioner,

vs.

NATIONAL GAS APPLIANCE CORPORATION,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TWENTIETH CENTURY PRESS, INC., CHICAGO 6

INDEX

CITATIONS

CASES

	PAGE
Air Devices, Inc. v. *Titus Mfg. Corp.*, 269 F. 2d 837 (C.A. 3, 1959)	3
El Reno Wholesale Grocery Co. v. *Stocking*, 293 Ill. 494, 127 N. E. 642 (1920)	5
Erlanger Mills v. *Cohoe Fibre Mills*, 239 F. 2d 502 (C.A. 4, 1956)	3
Fidelity Trust Co. v. *Field*, 311 U. S. 169	3
Grobark v. *Addo Machine Co.*, 16 Ill. 2d 426, 158 N. E. 2d 73 (1959)	1, 3, 4, 5, 6, 7
Grobark v. *Addo Machine Co.*, 18 Ill. App. 2d 10, 151 N. E. 2d 425 (1958)	4
Hanson v. *Denckla*, 357 U. S. 235	2, 7
Hausman Steel Co. v. *N. P. Severin Co.*, 316 Ill. App. 585, 45 N. E. 2d 552 (1942)	5
Mississippi Wood Preserving Co. v. *Rothschild*, 201 F. 2d 233 (C.A. 5, 1953)	4
Pulson v. *American Rolling Mill Co.*, 170 F. 2d 193 (C.A. 1, 1948)	2, 3
Riverbank Laboratories v. *Hardwood Products Corp.*, 350 U. S. 1003	7
Venus Wheat Wafers, Inc. v. *Venus Foods, Inc.*, 174 F. Supp. 633 (D. Mass., 1959)	3

STATUTES

1 Illinois Revised Statutes, ch. 32, § 157.102 (1959)	2
Illinois Civil Practice Act, § 17(1)(a)	1, 2, 3

MISCELLANEOUS

Bernhard, "A Rationalization of the Illinois Conflict of Laws Rules Applicable to Contracts," 40 Illinois Law Review 165, 184 (1945)	6
Lynn, "Groundwork for the Lawsuit," 1954 Ill. Law Forum 536-540	6
O'Connor and Goff, "Expanded Concepts of State Jurisdiction Over Non-Residents," 31 Notre Dame Lawyer, 223, 237 (1956)	2

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Respondent seeks to minimize the lower court's refusal to follow the Illinois Supreme Court's decision in *Grobark v. Addo Machine Co.*, 16 Ill. 2d 426, 158 N. E. 2d 73 (1959), by arguing that jurisdiction over foreign corporations is not an independent question of state law, since the federal constitutional limitations on state jurisdiction and the requirements of Illinois law are said to be identical (Br. 8). Respondent asserts that "the opinion of the Illinois Supreme Court in *Grobark* revolves about the Federal Constitutional problem." *Ibid.* However, the Illinois Court in the *Grobark* opinion, in construing Section 17(1)(a) of the Illinois Civil Practice Act, recognized that the questions of state and federal law are distinct. It stated:

> "While the constitutional question is always present in determining whether a State, consistent with due

process, can enter an *in personam* judgment against a nonresident defendant, nevertheless it is important to avoid placing the cart before the horse. If, for example, there are no minimum contacts with the State in a particular case, it will be unnecessary to decide whether the State, consistent with due process, can assume jurisdiction • • •." 16 Ill. 2d at p. 431.[1]

To the same effect, see *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193, 194 (C.A.1, 1948).

Even if the limits on jurisdiction imposed by Illinois law were coextensive with those of the Fourteenth Amendment, the Illinois courts could not and would not have assumed jurisdiction over petitioner in the present case. The power of a state to assume jurisdiction over nonresidents is not unlimited. *Hanson* v. *Denckla*, 357 U. S. 235. The present case does not involve a state's manifest interest in protecting its residents who are injured by a nonresident engaged in activity subject to special regulation, such as insurance. *Idem* at p. 252. Both petitioner and respondent are foreign corporations not licensed to do business in Illinois (R. 50, 59).[2] Petitioner has no office or agent in Illinois. Jurisdiction is asserted on the basis of a single alleged executory contract negotiated in Sweden. Even if a contract had been formed, which petitioner

1. In this connection, it may be noted that the Illinois Legislature enacted a narrower statute than other states (Pet. 6). Under Section 17(1)(a) Illinois "does not reach the limit of its constitutional power • • •." O'Connor and Goff, "Expanded Concepts of State Jurisdiction over Non-Residents," 31 Notre Dame Lawyer, 223, 237 (1956).

2. Respondent's contention that its dealings with petitioner constituted the "transaction of business" in Illinois by petitioner is belied by respondent's failure to obtain the certificate required by any foreign corporation "before it transacts business" in Illinois (R. 59). 1 Ill. Rev. Stat. ch.32, § 157.102 (1959). Since it appears that respondent, purely a paper corporation, transacted no business in Illinois, it could not have been sued there (cf. Br. 17).

denies, it would involve no more than interstate sales by a foreign manufacturer to an independent buyer in the forum. This is not enough to warrant jurisdiction. *Air Devices, Inc.* v. *Titus Mfg. Corp.*, 269 F. 2d 837 (C.A.3, 1959); *Venus Wheat Waters, Inc.* v. *Venus Foods, Inc.*, 174 F. Supp. 633 (D. Mass., 1959; Aldrich J.). To sustain jurisdiction in such a situation "would not only be offensive to the due process clause but it would involve the danger of grave burdens and impediments to interstate commerce." *Erlanger Mills* v. *Cohoc Fibre Mills*, 239 F. 2d 502, 507 (C.A.4, 1956).

These constitutional questions need not be decided in the present case, however, because Illinois law as declared by its highest court does not permit jurisdiction. Regardless of the theory of the *Grobark* opinion, the result there reached will be controlling on Illinois courts and must therefore be followed in diversity cases. *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193, 195 (C.A.1, 1948).

Respondent is obviously dissatisfied with the *Grobark* decision and relies on the dissenting opinion in that case (Br. 17), but of course the court below was bound to follow the ruling of the majority. Respondent suggests that the majority opinion "completely emasculated" Section 17 of the Illinois Civil Practice Act and thus "no court could be criticized for failure to follow *Grobark*" (Br. 21). However, federal courts in diversity cases are bound by state court decisions even if they believe them to be erroneous interpretations of a state statute. *Fidelity Trust Co.* v. *Field*, 311 U. S. 169.

Respondent implies that the *Grobark* decision should be ignored because each case "turns on its own facts" and must be decided "on an *ad hoc* basis" (Br. 9). But courts in other circuits have recognized that a leading state court

opinion "not only lays the law down for its precise facts but clearly set[s] down the principles which are to guide in future decisions * * *." *Mississippi Wood Preserving Co.* v. *Rothschild*, 201 F. 2d 233, 235 (C.A.5, 1953). As explained in the petition for certiorari, the principles laid down in the *Grobark* case preclude the assertion of jurisdiction here. (Pet. 10). To ignore these principles because of insignificant factual distinctions would result in eliminating all basis for predictability and consistency in the law. Furthermore, any distinctions between the present case and *Grobark* make it obvious that the court which decided *Grobark* would *a fortiori* deny jurisdiction here (Pet. 10-11).

Respondent attempts to distinguish the facts of the *Grobark* case although none of these supposed distinctions was considered even worthy of mention by the court below, which failed to discuss the *Grobark* case. Many of these irrelevant "distinctions" did not even occur to respondent until the brief in opposition to certiorari was filed. Before the district court respondent did not attempt such distinctions but instead shortsightedly referred to the opinion of the Appellate Court of Illinois in the *Grobark* case (18 Ill. App. 2d 10), before it was affirmed, as follows:

> "This case is not the law of Illinois for the Supreme Court granted leave to appeal on September 16, 1958, 19 Ill. App. 2d ii. Until the case is finally decided the Appellate Court decision is not binding. We believe the case will have a 'brief career'." (District Court Br. 19-20.)

Several misstatements appear in respondent's comparison of the two cases. Whereas it was undisputed that the defendant's president in *Grobark* carried on the contract negotiations with plaintiff in Illinois (16 Ill. 2d at pp. 427-428), respondent baldly states that this fact was merely plaintiff's allegation and that the Supreme Court found

otherwise (Br. 19)! Respondent asserts that "solicitation was absent in the *Grobark* case" (Br. 19), but as the opinion there states, the defendant "made various efforts to obtain the names of plaintiff's customers and dealers" and "and after considerable importuning" plaintiff agreed. 16 Ill. 2d at pp. 427-428. Respondent also makes the astounding statement that in the present case, unlike *Grobark*, petitioner's negotiations with respondent made them "virtually a partnership" (Br. 20). Nothing in the record even remotely supports this assertion which is made for the first time in respondent's brief in opposition. The negotiations between petitioner and respondent were at arm's length between separate, independent concerns, one of which was a prospective seller and the other a prospective buyer. Under the proposed contract petitioner would have had no interest in respondent's profits or voice in its operations and respondent was not even to use petitioner's name on its products (R. 9-10). Respondent also asserts that in the present case there was a contract whereas there was none in *Grobark* (Br. 20). In fact, there was unquestionably a contract in the *Grobark* case which had been in effect for two years. Although the defendant claimed the agreement was unenforceable for lack of mutuality, the Illinois Supreme Court assumed its validity and therefore never reached this question. (16 Ill. 2d at pp. 428, 437, 438.) In the present case petitioner has consistently denied that its negotiations with respondent ever culminated in an agreement.[3] Petitioner contends that even

3. As petitioner told the court below, its letter of January 21 refers to a final agreement which was never drafted or signed (R. 11). Such references to a formal contract in negotiations by correspondence indicate that the parties do not intend the contract to be binding until the formal agreement is signed. *E.g., El Reno Wholesale Grocery Co.* v. *Stocking*, 293 Ill. 494, 500-501, 127 N. E. 642 (1920); *Hausman Steel Co.* v. *N. P. Severin Co.*, 316 Ill. App. 585, 45 N. E. 2d 552 (1942). Respondent knew there was no contract, for it requested petitioner to "draw agreement" in its purported "acceptance" cable of January 28 (R. 12).

if there was a contract, under *Grobark* the Illinois courts would not take jurisdiction. The opinion below misinterpreted petitioner's statement to be a concession that there was a contract. But in the present case the very existence of an enforceable contract is questionable, and this alleged executory contract is the sole basis for asserting jurisdiction over the defendant.

Respondent's assertion that a denial of jurisdiction would "give petitioner relative immunity from legal responsibility" (Br. 17) is groundless. If respondent's claim for $1,000,000 damages (R. 5) is not frivolous it should adequately cover the expenses of a suit in Sweden. Respondent's agents have not found the expense of a trip to Sweden "prohibitive" in the past (R. 25-26, 31-32, 38). Sweden is a more appropriate forum for the suit because many of the witnesses reside there, the alleged contract was negotiated there,[4] and performance was also to take place abroad (R. 10). Moreover, Swedish law would govern the construction of the alleged contract and indeed determine whether there was a contract. See Lynn, "Groundwork for the Lawsuit," 1954 Ill. Law Forum 536-540; Bernhard, "A Rationalization of the Illinois Conflict of Laws Rules Applicable to Contracts," 40 Illinois Law Review 165, 184 (1945). Since conspiracy Count III has been eliminated (Pet. 20-21), it is immaterial that Manitowoc could not be joined in a Swedish action. Nor could petitioner have sued respondent in Illinois, as respondent claims (see Note 2, *supra*).

Respondent alludes to "petitioner's constant references to the requirement in the forum of a 'registered agent' to sustain jurisdiction over a foreign corporation" (Br. 18). There is not a single such reference in the petition. Peti-

4. The purported contract was negotiated solely in Stockholm (R. 9, 25-26, 31-32). Therefore the complaint does not allege any contract negotiations in Illinois (R. 2-4, 24-28).

tioner does not and has never argued that a foreign corporation can be sued in a state only if it qualifies to do business there by naming a registered agent. Nor does petitioner deny that "regular, continuous and sustained" solicitation of business within a state by a resident agent, as in the *Frene* case cited by respondent (Br. 17), is enough to sustain jurisdiction.

Petitioner does contend, however, that it cannot be sued in Illinois on the basis of a single alleged executory contract, mailed from Sweden and covering the sale of goods to be delivered abroad, when petitioner has no office or agent of any kind residing in the state. This view was adopted by the *Grobark* decision, which is controlling in the present case, and has also been adopted in circuits other than the Seventh. See Pet. 11. The failure of the court below to adhere to this principle raises important questions for certiorari, not only because it presents serious constitutional questions as to the power of the respective States over foreign corporations, *Hanson* v. *Denckla*, 357 U. S. 235, but also because it disregards controlling state law. *Riverbank Laboratories* v. *Hardwood Products Corp.*, 350 U. S. 1003. The "box-score" of Seventh Circuit decisions compiled by respondent (Br. 23, note 7) does not indicate that that court has retracted its decision in the instant case to open federal courts to suits on contracts against foreign corporations whose contacts with Illinois are insufficient to warrant jurisdiction under state law. Reversal of the decision below is required in order that the principle may be firmly established that state court decisions regarding jurisdiction over foreign corporations must be followed by federal courts of appeal in diversity cases. If this case had remained in the state court (Pet. 2, note 2), there is no doubt that it would have been dismissed under the *Grobark* decision. Being a diversity case, the result should be the same in the federal court.

CONCLUSION

For the reasons expressed herein and in the petition, a writ of certiorari should issue. Because the refusal of the court of appeals to follow the Illinois Supreme Court's most recent construction of the state jurisdictional statute was so egregious, petitioner suggests that the judgment below should be summarily reversed at the same time.

Respectfully submitted,

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January 1960.